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Issue Date: 10 March 2004

In the Matter of

Tonya Anderson,
Claimant

v.

Department of the Army NAF, and
RSKCo.
Employer/Carrier

Case No.: 2003-LHC-01704

DECISION AND ORDER GRANTING BENEFITS[1]

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., and extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171, et seq. (hereinafter "the Act"). A hearing was held before me in Fayetteville, North Carolina on September 23, 2003, at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Claimant's Exhibits 1-9, Employer's Exhibits 1-43, and ALJ Exhibits 1-8 were admitted into evidence. The Claimant's post-hearing brief was filed on January 8, 2004; and the Employer's post-hearing brief was filed on January 9, 2004. I have reviewed and considered these briefs in making my determination in this matter.

I. Statement of the Case

Testimony of the Claimant

On September 7, 2000, the date of the subject accident or injury, the Claimant had been hired by the Department of Army Nonappropriated Fund ("NAF") and was working as a program assistant for the Fernandez Child Development Center at Fort Bragg (hereinafter "Employer") in Fayetteville, North Carolina. At the time of the accident, the Claimant had been working for the Employer for approximately eight weeks. The Claimant was responsible for developing educational plans, organizing activities, and caring for the children.

[1] Citations to the record of this proceeding will be abbreviated as follows: "Tr." refers to the Hearing Transcript; "CX" refers to Claimant's Exhibits; and "EX" refers to Employer's Exhibits.

The Claimant was born on October 22, 1964 and graduated from high school in 1982. She married her husband Kenneth, who was in the United States Army at the time. Soon after moving to Fort Bragg in 1992, the Claimant began working for NAF. The Claimant earned an associate's degree in early childhood development from Fayetteville Tech Community College in 2002 while working part-time in childcare. At the hearing, the Claimant testified that she has been able to take notes, use a computer, and perform other clerical activities since her injury. In fact, the Claimant prepared most of the filings related to the instant claim on her own with little assistance.

At the time of the injury, the Claimant was supervising and entertaining the children on the outdoor grounds of the care center by pushing a number of them around in an infant buggy. The Claimant testified that she noticed the buggy rattling, and discovered that one of the wheels was broken. As a result, she had great difficulty pushing the buggy. Suddenly, the Claimant felt a strain and heard a snap in her left shoulder. She continued to work the rest of the week and into the following week, but eventually, the pain became unbearable. The Claimant left work and checked into the Womack Army Medical Center on September 13, 2000. After being diagnosed with a shoulder strain, the Claimant was told not to lift more than 10 pounds for a period of seven days. On September 14, 2000, the Claimant completed an accident report explaining that she left work because of her shoulder pain. The Employer began paying disability compensation to the Claimant effective on September 13, 2000.

After continuous visits to the Womack Army Medical Center and routine physical therapy, the Claimant eventually returned to light-duty work for the NAF on March 28, 2001. On April 13, 2001, Major McHenry, M.D. excused the Claimant from work because of continued complaints about pain. The Claimant never returned to work for NAF. The Claimant testified that she subsequently attempted to work with her husband at the Abundant Life Ministries as an administrative assistant during the first week in March 2001. While at the church, the Claimant performed various administrative duties such as writing checks, typing correspondences, sorting mail, and filing papers. She only worked at the church for a short time, and according to the Claimant, was never paid for her services.

On November 6, 2001, NAF officially terminated the Claimant's employment because she had become incapable of working as a program assistant at the childcare center. According to the Claimant, she has not worked another job since her injury other than at the church. The Claimant explained that while she was working for the church, she was making every effort to find employment.

The Claimant received occasional treatment for her shoulder throughout 2002 and 2003. At the time of the hearing, the Claimant explained that her shoulder still "hurts to reach" and limits the amount of housework she can perform. She claims her left shoulder, arm, wrist, and hand fatigue easily. The Claimant has not had surgery on her left shoulder, nor has any physician of record recommended surgery. The Claimant is right-handed.

During the hearing, the Claimant testified that many of the physicians of record instructed her to avoid lifting over 10 pounds and limit any repetitive movements. Although the physicians' instructions, along with the pain she experiences, limit her ability to work to an

extent, the Claimant stated that she believed she could work in a variety of jobs. Even so, the Claimant admits she inquired into only four jobs—and actually sent a resume to only one—listed on her labor market survey reports, and she never looked through the classified section of the local *Fayetteville Observer*. The Claimant acknowledged that if she in fact looked for a job, she would probably find one. In an attempt to explain her less-than-fervent job search, the Claimant stated:

> Just to run out there and just get any type of job, I'm not saying that it would belittle me or anything, but there were different particular things that I wanted to do.

(Tr. at 54).

During the hearing, the Claimant recounted that she inquired about a position with a bridal consulting company but did not apply because she felt she was not qualified. She also inquired about an office assistant position at Fayetteville State University, but the position had already been filled. The only job opportunity for which the Claimant actually applied was with Cumberland County Partnership for Children. According to the Claimant's testimony, the position was within her qualifications and educational training since earning her associate's degree. However, Cumberland County Partnership never responded to the Claimant's application and the Claimant never followed up with further inquiry.

Testimony of Kenneth Anderson[2]

Mr. Anderson's testimony paralleled that of the Claimant. He stated that the Claimant called him immediately after her injury occurred. They initially tried to avoid a trip to the hospital, but the pain worsened over the next few days, and eventually the Claimant saw a doctor.

Mr. Anderson described some of the Claimant's physical limitations that he had observed. For example, the Claimant had difficulty at times removing the lid of a can or jar because of diminished strength. Some days, according to Mr. Anderson, the Claimant would spend an entire day in pain. In short, Mr. Anderson noticed a gradual decrease in the amount of activities the Claimant has been able to perform.

Craig Estes, PA[3]

On September 13, 2000, physician's assistant Craig Estes examined the Claimant upon her arrival at the Womack Army Medical Center. Mr. Estes diagnosed the Claimant with a left shoulder strain, and recommended that she not lift more than 10 pounds for a period of seven

[2] Mr. Kenneth Anderson is the Claimant's husband. He was called to testify by and on behalf of the Claimant (Tr. 57).

[3] No physicians, physicians' assistants, or physical therapists testified at the hearing. Any evidence supplied by the medical professionals of record appears summarized in this Decision and Order via their reports, which have been submitted to this court as exhibits by the Employer in accordance with the Pre-Hearing Order.

days. He noted that the Claimant could return to light work immediately, and prescribed physical therapy. The Claimant returned to Mr. Estes many times over the following months.

After a similar examination on September 20, 2000, Mr. Estes again instructed the Claimant that she could return to work, and extended the lifting restriction for another 30 days (Ex 18). On October 19, 2000, Mr. Estes removed the Claimant from work for 14 days and instructed her to continue physical therapy (EX 18). O \n November 2, 2000, Mr. Estes instructed the Claimant to return to work and limit any lifting to 5 pounds for another 30 days (EX 18). On November 22, 2000, Mr. Estes noted that the Claimant could return to work and continued her 5 pound lifting restriction (EX 18). Identical instructions were again given to the Claimant on December 19, 2000, January 9, 2001, and January 16, 2001 (EX 18).

Major Thomas W. Gibson, M.D.

Dr. Gibson examined the Claimant at the Womack Army Medical Center on November 15, 2000 (EX 18 at 14). Dr. Gibson's brief handwritten remarks are difficult to read. However, it appears as though he diagnosed the Claimant's condition as rhomboid tendonitis, and prescribed physical therapy.

Stanley Dziedzic, M.D.

At the request of the Employer, Dr. Stanley Dziedzic completed an independent medical evaluation of the Claimant on December 27, 2000 (EX 19). Initially, Dr. Dziedzic noted the Claimant's subjective complaints of pain when lifting more than 5 pounds, that reached levels of almost 9/10 at times. Upon evaluation, Dr. Dziedzic reported full active range of motion in the Claimant's left shoulder, along with 5/5 left and right handed grip strength.

Dr. Dziedzic diagnosed the Claimant with myofascial strain of the trapezius and shoulder. In summary, however, he concluded that the pain and paresthesia symptoms offered by the Claimant were not consistent with her pain drawing and admissions on exam (EX 19 at 5). Dr. Dziedzic did note that the Claimant's past treatment was reasonable and necessary. He recommended continued physical therapy three times a week for three weeks. At the time of his report (December 27, 2000), Dr. Dziedzic opined that the Claimant had not reached maximum medical improvement, but anticipated she would by the end of her physical therapy sessions. He found no evidence of permanent impairment and offered no impairment percentage rating based on his evaluation. Dr. Dziedzic stated that the Claimant could return to her pre-injury position at full duty at the end of her prescribed treatment.

Dr. Dziedzic's subsequent Work Restriction Evaluation included very few restrictions (Ex 19 at 6): he noted only that the Claimant should not lift 10-20 pounds; he indicated no restrictions on the use of the Claimant's hands, including pushing and pulling, grasping, and fine manipulation; and he noted that the Claimant could intermittently or occasionally reach or work above the shoulder. According to Dr. Dziedzic's report, the Claimant was capable of working eight-hour days. Dr. Dziedzic specifically noted that the Claimant's limitations would last only until therapy was completed, and after that there would be no restrictions.

Major Timothy McHenry, M.D.

On April 13, 2001, orthopedic surgeon Major Timothy McHenry examined the Claimant at the Womack Army Medical Center. His hand written notes are also difficult to read, but they appear to report the Claimant's complaints of pain in her shoulder, and note that the Claimant suffered from some weakness in her grip. Dr. McHenry ordered an MRI scan and removed her from work for 45 days (EX 18). Almost two weeks later, Dr. McHenry diagnosed the Claimant with "cervical disc herniation and rotator cuff tendonopathy" (EX 18 at 30). He suggested that the Claimant undergo a workers compensation disability rating. Dr. McHenry found the MRI results to be negative (EX 31, 34).

Major Steven Norris, M.D.

Chief Orthopaedic Surgeon at Womack Army Medical Center Major Steven Norris also examined the Claimant on April 25, 2001. Dr. Norris explained in his report that the presumptive diagnosis for the Claimant was either shoulder tendonitis, versus a herniated cervical disc (EX 18 at 29). He noted that because of her inability to lift any weights, she should not return to work for 45 days (EX 18 at 29).

Major Mary Ellen Earwood, M.D.

On September 14, 2001, Major Mary Ellen Earwood examined the Claimant at the Womack Army Medical Center. In her report dated October 10, 2001, Dr. Earwood diagnosed the Claimant with myofascial pain syndrome of her trapezius muscle (EX 18 at 41). She further described the Claimant's condition as chronic and work related. Dr. Earwood instructed the Claimant to lift no more than 5 pounds, to refrain from pushing or pulling anything greater than 15 pounds, and to take frequent breaks when performing desk work. Based on the Claimant's limitations and the chronicity of her symptoms, Dr. Earwood suggested that the Claimant consider changing career fields.

Dr. Earwood examined the Claimant again on May 3, 2002 (EX 18 at 42). Her notes indicate that the Claimant complained of decreased ability to perform fine motor skills, and difficulty carrying items. Dr. Earwood's impression was similar to her diagnosis of October 10, 2001—that is, the Claimant suffered from chronic myofascial pain syndrome of her mid trapezius (EX 18 at 43).

Paul Wright, M.D.

On October 18, 2001, Dr. Paul Wright completed an independent medical evaluation of the Claimant (EX 20). His report indicates that the Claimant's left shoulder strength was satisfactory, with some tenderness over the area of the shoulder. Dr. Wright reported chronic cervical, upper trapezius, and rhomboid strain, consistent with myofascial pain syndrome. Simultaneously, Dr. Wright commended the Womack physicians for their treatment and diagnoses, and declared that the Claimant had reached maximum medical improvement. Specifically, he stated that her condition had stabilized and was not likely to deteriorate. He also noted that it was unlikely that the Claimant would be able to return to working in day care. Dr.

Wright restricted the Claimant's lifting to 10 pounds, and concluded, based on the American Medical Association's *Guide to the Evaluation of Permanent Impairment*, that the Claimant suffers from a 5% whole person permanent partial impairment.

Dr. Wright completed a second independent medical evaluation on July 21, 2003 at the request of the Employer (EX 31). Dr. Wright noted a good bit of pain upon examination of the Claimant, and with any motion of the left shoulder, along with severely diminished strength in her left arm and shoulder. Again, Dr. Wright diagnosed the Claimant's condition as msyofascial pain syndrome. Despite her subjective complaints of increased discomfort, Dr. Wright reported that she had been fairly stable over the past two years or so. He concluded that the Claimant had reached maximum medical improvement, as her symptoms were long term and possibly permanent. Using the Fifth Edition of the American Medical Association's *Guide to the Evaluation of Permanent Impairment*, Dr. Wright again determined that the Claimant suffered from a 5% whole person impairment. Additionally, Dr. Wright suggested the Claimant restrict her lifting to 10 pounds and refrain from repetitive movements with her left upper extremity. He opined that if she followed his suggested limitations, it should be safe for her to work.

Dr. Wright specifically addressed the Claimant's ability to perform particular jobs listed in her labor market survey. He approved of the more sedentary positions that involved basic clerical duties, but disapproved of other positions requiring more physical activity, such as bus driver, pizza delivery driver, and sales associate, because of the potential lifting and repetitive movements.

Major Jean Cyriaque, M.D.

On February 14, 2003, Major Jean Cyriaque examined the Claimant at the Womack Army Medical Center. Dr. Cyriaque's examination revealed findings similar to those previously reported by the other physicians at Womack (EX 18 at 49). Dr. Cyriaque specifically noted that the Claimant suffered from recurrent left shoulder and arm pain with decreased gripping strength. He instructed the Claimant to refrain from lifting beyond 10 pounds, and rest her arm as needed.

Michelle Donasky, PA

On May 9, 2003, physician's assistant Michelle Donasky of the Cape Fear Orthopaedic Clinic in Fayetteville, North Carolina examined the Claimant at the request of Dr. Cyriaque (EX 35). The Claimant complained of worsening symptoms exacerbated by lifting and exercising. Ms. Donasky found that the Claimant was in no acute distress, but did describe shoulder and trapezius tenderness. The Claimant's strength was reportedly 5/5, and Ms. Donasky noted that the Claimant's left shoulder joint appeared stable.

After reviewing the Claimant's medical records, MRI results, x-rays, and nerve conduction study results, Ms. Donasky concluded that all were within normal limits and that there was nothing to offer the Claimant at the orthopedic clinic. She instructed the Claimant to use her left arm as tolerated and return to light-duty work.

Testimony of Barbara Byers[4]

On February 13, 2002, the Employer asked Ms. Byers to complete a vocational evaluation and labor market survey regarding the Claimant's present claim (EX 22). Ms. Byers met with the Claimant on February 26, 2002; she administered a wide range achievement test (i.e. reading and arithmetic), evaluated the Claimant's medical restrictions, and reviewed a number of the Claimant's medical reports.

Ms. Byers' vocational assessment showed that the Claimant has a wide range of marketable skills market including customer service, bookkeeping, and keyboarding skills, among others. The report notes the Claimant's past experience with computers, copiers, and facsimiles, and her past work experience in customer service, daycare, inventory control, and scheduling. Ms. Byers characterized the Claimant's educational skills as average. Overall, Ms. Byers described the Claimant as someone who interviews well and expresses an interest in working.

Ms. Byers reported few work restrictions based on the Claimant's physical capabilities. Specifically, the Claimant's only restriction is in lifting over 10 pounds, and overhead work with her left arm. Based on the Claimant's work history, education, and physical capabilities, Ms. Byers concluded that she qualifies for a variety of positions available in the labor market.

A labor market survey, listing potential employers matching the Claimant's qualifications and capabilities, was mailed to the Claimant (EX 22). The labor market survey included eight available positions in the Claimant's area. Each position listed was available effective March 2002. Ms. Byers testified that since mailing the list to the Claimant, she contacted the employers and learned that the Claimant had yet to apply to any of the positions as of May, 2002 (EX 23).

After the Claimant earned her associate's degree and a functional capacity evaluation was completed,[5] Ms. Byers updated the Claimant's labor market survey in August of 2003 (EX 36). The updated survey lists seven jobs available in the Claimant's area which are appropriate for the Claimant's upgraded qualifications and physical restrictions. Among the listed positions, the Claimant has only submitted a resume to the Cumberland County Partnership for Children.

Edie S. Spivey

Ms. Edie Spivey acted as the Claimant's vocational rehabilitation counselor from 2001 through 2003 (EX 38). In a report dated April 18, 2003, Ms. Spivey noted that the Claimant worked part-time as an administrative assistant with Abundant Life Ministries. According to the report, the Claimant was not interested in pursuing other employment until a later doctor evaluation. Ms. Spivey stated in her report that the "feasibility of success is undetermined."

[4] Ms. Barbara Byers is a certified rehabilitation counselor with Atlantic Rehabilitation Services, Inc. She has a Bachelor's degree in psychology and a master's degree in rehabilitation counseling. Ms. Byers was called to testify by and on behalf of the Employer (Tr. 61).

[5] Physical Therapist Penny Schulken completed a functional capacity evaluation on April 9, 2003 (EX 30). Ms. Schulken noted the Claimant's decreased grip strength in her left hand, and her ability to lift 11 lbs. overhead. She concluded that the Claimant qualifies for light and sedentary work.

Surveillance Video[6]

The Employer introduced a surveillance videotape depicting a woman who resembles the Claimant lifting what appears to be a clothes hanger with two garments while walking from the front door of a residence to a car parked in the driveway, no more than ten yards away (EX 40). The woman in the videotape held the hanger at about head level for no more than one minute[7] before she walked to the parked car and placed the garment in the backseat.

Claimant's Exhibits

A number of the Claimant's ten exhibits are duplicative of the Employer's exhibits and have already been discussed above or otherwise considered in the determination of this matter. Those duplicative exhibits are: CX 2 (Dr. Steven Norris' report); CX 3 (Dr. Timothy McHenry's report); CX 4 (Dr. Donald Maharty's report); CX 7 (Dr. Paul Wright's July 21, 2003 independent medical evaluation); and, CX 8 (PA Michelle Domasky's examination report).

Claimant's Exhibit 1 is a "general affidavit" of Faye Toles, who was the Claimant's co-worker at the time of her injury. The statement was introduced as corroboration for the Claimant's explanation of how the injury occurred and what transpired thereafter. Claimant's exhibit 5 is the printout version of a generic website explaining msyofascial pain syndrome. The two-page exhibit contains no explanation of the source of the information, nor does it include the name of the author of the article. Claimant's Exhibit 6 is a schedule of the Claimant's doctor appointments during the period April 21, 2000 through January 8, 2001. The schedule lists the attending physician or physician's assistant, location of the visit, and a brief description of the purpose of each visit. Claimant's Exhibit 9 is a black and white picture of an infant buggy similar to the buggy the Claimant was pushing at the time of her injury.

Finally, Claimant's Exhibit 10 is a job description for the position of "office assistant II" with the City of Fayetteville, North Carolina. That particular job is listed in the Claimant's first labor market survey prepared by Ms. Byers. Claimant's Exhibit 10 generally describes the duties, characteristics, responsibilities, and qualifications for the position.

II. Stipulations

The parties have stipulated, and based on the record I find the following:

1. 33 U.S.C. §901 et seq. (LWHCA) is applicable to this claim.

2. The accident of September 7, 2000 arose out of and in the scope of the Claimant's employment with the Employer.

[6] I did not view the video at the hearing. Instead, I watched the video as part of my review of the entire record before making my final determination in this matter.

[7] The date indicator displayed on the videotape read July 15, 2003. The time indicator read 8:23 a.m. when the woman walked out of the residence with the clothes hanger in her hand; it read 8:24 a.m. when she placed the garments into the backseat of the parked car (EX 40).

3. The Claimant and Employer were in an employer/employee relationship on the date of the accident or injury.

4. The Claimant provided timely notice of the injury to the Employer.

5. The Claimant's claim was timely filed.

6. The Employer has paid Claimant disability compensation during the period from September 13, 2000 through March 27, 2001, and again from April 11, 2001 through January 14, 2003 in the total amount of $26,545.20.

III. Issues

The issues before me are the following:

1. What is the Claimant's average weekly wage upon which compensation is to be calculated?

2. What is the nature and extent of the Claimant's disability?

3. Whether the Claimant has suffered loss to her wage-earning capacity.

IV. Discussion

Average Weekly Wage

Although it is unclear from the record what exactly the Claimant's position is with regard to the issue of average weekly wage, it is quite clear after a review of the hearing transcript that the parties have not reached an agreement on this issue. The Employer contends that the Claimant's average weekly wage is $221.21. By dividing the Claimant's total earnings during her employ with Employer by the number of weeks (8) in which she worked for Employer, the Employer claims that she earned $221.21 per week (EX 5). The Claimant, on the other hand, did not introduce any evidence on this issue during the hearing, and has instead simply requested a total amount of $250,000.00 in compensation to cover "economic damages includ[ing] lost [sic] of earnings, lost [sic] of retirement benefits, profit sharing, health care coverage, and other benefits lost due to the inability to work." Claimant's Closing Argument at 1 (January 5, 2003).

According to Section 10 of the Act, "the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation." 33 U.S.C §910. Sections 10(a) and (b) do not apply to the instant claim because there is no evidence of record upon which to base a calculation under those particular subsections. Therefore, Section 10(c) of the Act governs the computation of the Claimant's average weekly

wage. *Guthrie v. Holmes & Narver, Inc. and Wausau Insurance Co.*, 30 BRBS 48, 51 (1996) ("The computation of average annual earnings must be made pursuant to Section 10(c)…if subsections (a) or (b) cannot be reasonably and fairly applied."). Section 10(c) of the Act provides:

> If either [Section 10(a) or Section 10(b)] can not reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c). The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of her injury. *Guthrie*, 30 BRBS at 51. It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *Id.*

Here, the only evidence in the record establishing the Claimant's weekly wage on September 7, 2000—i.e. the time of the injury—is Employer's Exhibit 5, which contains the Claimant's hourly rate and total earnings during her brief tenure with the Employer. The Claimant worked for the Employer on an intermittent basis for a total of eight weeks. At an hourly rate of $9.78, the Claimant was paid $1,769.71 during the period beginning July 12, 2000 and ending on September 20, 2000. The Claimant never returned to work for the Employer, nor did she receive any additional wages from the Employer. Since the Claimant submitted no evidence establishing her average weekly wage at the time of the injury, I am limited to determining that figure based on what *is* in the record—that is, the Claimant's total earnings for an eight-week period. Accordingly, I find that the Employer's calculation of $221.21 per week ($1,769.71 ÷ 8 weeks) is reasonable under Section 10 of the Act.

Nature and Extent of Disability

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Construction Co.,* 17 BRBS 56, 59 (1985). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. The extent of a disability, on the other hand, cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Disability is defined under the LHWCA as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a

worker's physical injury and her inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage earning capacity.

A. Nature of Disability

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. *See Stevens v. Lockheed Shipbuilding Company*, 22 BRBS 155, 157 (1989); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235, fn. 5 (1985); *Trask,* 17 BRBS at 60. The date of maximum medical improvement is a question of fact based upon the medical evidence of record and is not dependant on economic factors. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). Here, the Claimant is seeking permanent total disability compensation. However, despite my instruction in an Order Closing the Record dated December 10, 2003 that I would consider the Claimant's claim for permanency, neither party specifically addressed the issue in their respective briefs. Nevertheless, based solely on the clear, albeit limited, evidence contained in the record regarding this issue, I find that the Claimant reached maximum medical improvement on October 18, 2001.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968)(per curium), *cert. denied*, 394 U.S. 876 (1969). In other words, an employee reaches maximum medical improvement when her condition becomes stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Limited*, 14 BRBS 395, 401 (1981). In the present case, the record demonstrates that the Claimant has been routinely examined by a number of physicians, physicians' assistants, and physical therapists over the past three years. During that time, the physicians have continuously reached consistent diagnoses; the therapists and PAs have consistently restricted the Claimant's lifting to no more than 10 pounds; and the Claimant has provided the same subjective complaints about her pain and limitations. In short, the medical evidence of record has not significantly changed since the week of the Claimant's injury more than three years ago. In December of 2000, Dr. Dziedzic predicted that the Claimant would reach maximum medical improvement by the end of January, 2001. Dr. Wright specifically concluded that the Claimant had reached maximum medical improvement in October, 2001; and, again in July, 2003, stated that the Claimant's condition had been stable for the last few years. After reviewing the medical records, I find that Dr. Wright's conclusion in October, 2001 is supported by and consistent with the other medical evidence.

Thus, based on the evidence presented, I find that the Claimant's conditioned stabilized, she reached maximum medical improvement, and the nature of her disability became permanent on October 18, 2001. *See James v. Pate Stevedoring Co*., 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask*, 17 BRBS at 60.

B. Extent of Disability

The question of extent of disability is an economic as well as a medical concept. *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, the claimant must show that she is unable to return to her regular or usual employment due to her work-related injury. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). If the employee establishes her *prima facie* case, the burden shifts to the employer to establish the availability of suitable alternative employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Should the employer fail to satisfy its burden, the extent of a claimant's disability will be deemed total. *See Blake v. Bethlehem Steel Corporation*, 21 BRBS 49 (1988).

Here, since the injury of September 7, 2000, the Claimant has not returned to work for the Employer or any other child care center. The Claimant testified, and the record reflects, that she continues to suffer from pain and fatigue, which has left her incapable of performing her duties at the child care center. Although the Claimant is capable of performing many tasks, she is clearly limited in the amount of weight she can lift. Many of the physicians of record noted that the Claimant could not return to her usual employment; Dr. Earwood even suggested that the Claimant change careers. More significantly, the Employer has admitted that the Claimant is unable to return to her job with the Fernandez Child Development Center. Employer's Post-Hearing Br. at 10 (January 9, 2004).

On the basis of the totality of the record, I agree with the Employer that the Claimant's work-related injury precludes her return to her usual employment at the child care center. The burden thus rests upon the Employer to demonstrate the existence of suitable alternative employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Rinaldi*, 25 BRBS 128, 131 (A claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment).

In order to meet its burden, Employer must show the availability of job opportunities within the geographical area in which Claimant was injured or in which Claimant resides, which she can perform given her age, education, work experience and physical restrictions, and for which she can compete and reasonably secure. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981); *see Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765, 10 BRBS 81, 86-87 (4th Cir**.** 1979). Here, the Employer presented vocational evidence in the form of live testimony by a vocational counselor, labor market surveys, and a functional capacity evaluation. The Claimant argues that some of the jobs contained in the labor market surveys were no longer available by the time she contacted the employers. However, "the employer is entitled to attempt to establish that at the critical times there were jobs reasonably available within [Claimant's] capabilities and for which [Claimant] was in a position to compete realistically had [s]he diligently tried." *Trans State Dredging v. Benefits Review Board*, 731 F.2d 199, 202 (4th Cir. 1984) quoting *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981). In other words, the Employer is not required to establish the availability of suitable employment at the time the Claimant decides

to contact the potential employer. Instead, the Employer can meet its burden by presenting evidence of suitable alternate employment which was available while the Claimant was able to work. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988). Consequently, the fact that the one-time-available position was unavailable at the time the Claimant inquired about the position does not by itself preclude a finding of the existence of suitable alternate employment.

In the case at bar, Ms. Byers testified that the Claimant had many marketable skills with which she could find employment. Indeed, based on my observations at the hearing, where the Claimant presented her case, I find the Claimant to be intelligent and articulate. Ms. Byers' labor market surveys are precise and contain lists of specific jobs that were available while the Claimant was able to work. The record clearly demonstrates that the Claimant was told by numerous physicians that she could return to work with lifting restrictions, as early as November of 2000.

Furthermore, the positions provided by Employer aptly account for the Claimant's physical restrictions and education level. The labor market surveys include detailed descriptions of the wages, physical demands, and necessary experience. Overall, Ms. Byers' work product is highly thorough and exceptionally tailored to this particular Claimant. Although Dr. Wright subsequently warned that the Claimant should stay away from a few of the more physically demanding jobs listed, the Employer has provided an adequate collection of sedentary positions entirely suitable for this Claimant considering her physical and mental capabilities. Accordingly, I find that Employer has more than sufficiently established the existence of suitable alternate employment.

Because I find the existence of suitable alternate employment, the burden shifts back to the Claimant to establish that she attempted to secure the suitable alternate employment opportunities with reasonable diligence. *Trans State*, 731 F.2d at 202. In other words, the Claimant must have been genuinely seeking work while demonstrating a willingness to work. *See id.*; *Turner*, 661 F.2d at 1043. In the instant case, the Employer contends that the Claimant did not look for a job, diligently or otherwise. I agree. The Claimant was injured in early September, 2000; she has not worked a paid position, sedentary or otherwise, since then. Since her injury, the Claimant's physicians, as early as November 22, 2000, have repeatedly told her she could return to work with limitations. In fact, the Claimant testified that she would probably find a job if she looked for one. Nevertheless, the Claimant remains unemployed, and her job search can at best be described as unenthusiastic. According to Ms. Byers, the Claimant has sent *one* resume in the past 3 years to a potential employer on her list of suitable employment opportunities, and she has only casually contacted 2-3 potential employers to inquire about the positions. Nor has the Claimant attempted to secure a position on her own by actively job hunting or simply searching the classified ads. Meanwhile, the Claimant continues to go to her physicians with the same complaints over and over again. She describes her symptoms as worsening, but her complaints are not always consistent with the medical evidence.

Based on the Claimant's testimony, which was essentially that she did not want to take just any job, it appears that she may be confused about the Employer's obligations under the Act. Clearly the Claimant can work at a variety of jobs that are suitable for her physical limitations

and intellectual capabilities. The Employer, although not obligated to do so under the Act, has even provided the Claimant with a means to contact and secure those jobs. The Claimant, however, seems to believe that she has to diligently pursue a job that she *likes*—as opposed to one that is suitable for her mental and physical capabilities under the Act. Although generally the Act has been liberally construed in favor of employees, the Act does not go quite as far as the Claimant wishes—that is, to award the Claimant compensation for her injury until she can find a desirable job. The general purpose of the Longshore Act is to aid injured employees by minimizing the need for litigation to secure compensation for their injuries. *Reed v. S. S. Yaka*, 373 U.S. 410, 415 (1963); *Rodriguez v. Compass Shipping Co.. Ltd.*, 451 U.S. 596, 616-17 (1981). This means that the Act is designed to ensure that covered workers are fairly and promptly compensated for claims arising out of their employment, while limiting the economic burden on employers. *See Donovan v. Washington Metropolitan Area Transit Authority*, 614 F. Supp. 1419, 1420 (D. D.C. 1985), *aff'd* 796 F.2d 481 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 10 1 3 (1987); *Vilanova v. United States*, 625 F. Supp. 651, 654 (D. P.R. 1986), *aff'd in part without op. and vacated on other grounds in part without op.*, 802 F.2d 440 (1st Cir. 1986), *reaff'd*, 851 F.2d 1 (1st Cir. 1988), *cert denied*, 488 U.S. 1016 (1989). An award for perpetual permanent total disability while suitable alternate employment exists, as the Claimant now requests, would not advance that purpose.

Based on the foregoing, I find that the Claimant is not totally disabled, inasmuch as the Employer has established the existence of suitable alternate employment, and the Claimant has not attempted to secure such employment with reasonable diligence. After reviewing the entire record, I further find that the Employer established the availability of suitable alternate employment on March 25, 2002.[8] *See Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991) (total disability becomes partial on the earliest date that the employer establishes suitable alternate employment.).[9] Accordingly, the Claimant is at most permanently and partially disabled as of March 25, 2002 for purposes of the Act. The inquiry, however, does not end there.

Wage-Earning Capacity

The Claimant's permanent partial disability is not the result of an injury to a scheduled member under Sections 8(c)(1)-(20) of the Act. Instead, her injury falls under Section 8(c)(21). An award for permanent partial disability in a claim not covered by the schedule is based on the difference between Claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §§ 908(c)(21), (h); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). Generally, "wage-earning capacity" refers to "an injured employee's ability to command regular income as the result of [her] personal labor," *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405 (1989), and is

[8] March 25, 2002 is the date that each suitable alternate position listed in Ms. Byers' first labor market survey was available (EX 22).

[9] The Fourth Circuit and Board have held, relying on *Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), that in order to meet its burden, an employer must establish the general availability of suitable alternate employment; not that an employer must inform a claimant that job openings exist. *See generally Lentz v. The Cottman Co.,* 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988) (for the proposition that an employer need not obtain a specific job offer for the claimant); *Turner*, 661 at 1043 ("The employer does not have to lead the claimant to water, only establish that water is nearby which the claimant may drink if he reaches for it.").

determined under Section 8(h), which provides that if a claimant has no actual post-injury earnings, the administrative law judge must consider relevant factors and calculate a dollar amount which reasonably represents the Claimant's wage-earning capacity. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 41-2. Relevant factors include evidence pertaining to available suitable alternate employment as established by Employer. *Id.* at 43 ("In determining claimant's earning capacity, the administrative law judge's inquiry is not limited to exclude relevant evidence regarding the open market.").

Here, Ms. Byers' labor market surveys provide great detail regarding the wages of the suitable alternate employment. Based on her reports, the suitable alternate employment positions available before the Claimant earned her associate's degree provide an average wage of almost $8.00 per hour. If the Claimant were to make $7.00 per hour, which is the lowest entry level amount listed, the Claimant would make $245.00 per week working only 35 hours a week.[10] Additionally, since earning her associate's degree in 2002, the Claimant could reasonably earn $593.00 per week according to Ms. Byers' updated labor market survey (EX 36). In other words, the Claimant's wage-earning capacity has significantly increased even since the Employer first established suitable alternate employment. Therefore, based on the evidence of record, I find, by using a calculation most favorable to the Claimant, that her wage-earning capacity under Section 8(h) was at least $245.00 a week at the time Employer established suitable alternate employment.

Once "wage-earning capacity" is determined, Section 8(c)(21) instructs the administrative law judge to compare "wage-earning capacity" with pre-injury "average weekly wages" to determine the level of benefits. 33 U.S.C. §908(c)(21). Under Section 2(10) of the Act, a claimant is not entitled to a disability award if her physical impairment is not coupled with an economic loss. *Sproull*, 25 BRBS at 110. Based on the foregoing, it is apparent that the Claimant has not suffered a loss in wage-earning capacity. As of the date of the existence of suitable alternate employment, the Claimant's wage-earning capacity was greater than her average weekly wage at the time of the injury. Consequently, since the establishment of suitable alternate employment on March 25, 2002, the Claimant does not suffer from a "disability" for purposes of the Act.

CONCLUSION

In sum, based on a complete review of the evidentiary record, hearing transcript, and the parties' briefs, I find that the Claimant suffered a temporary total disability during the period beginning on September 13, 2000 and ending on Oct. 18, 2001, at which time her disability became permanent. From that date until March 25, 2002, the Claimant was permanently and totally disabled. The Claimant contends that she remains entitled to permanent total disability compensation. However, inasmuch as the Claimant has suffered no loss of wage-earning capacity, she is not "disabled" as of March 25, 2002, and she therefore, is not entitled to permanent total disability beyond that date.

[10] It is important to note here that although the Claimant's pre-injury wage was $9.78 per hour, she only worked about 22.5 hours per week. There is no evidence or reason provided why the Claimant could not work 35-40 hours a week with an occasional break at one of the sedentary positions described in the labor market surveys.

ORDER

On the basis of the foregoing, IT IS HEREBY ORDERED that the Employer shall:

A. Pay the Claimant temporary total disability compensation benefits from September 13, 2000 through October 18, 2001, based on an average weekly wage of $221.21.

B. Pay the Claimant permanent total disability benefits from October 18, 2001 through March 25, 2002, based on an average weekly wage of $221.21.

C. Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of her injuries of September 7, 2000.

D. The Employer shall pay all medical benefits to which the Claimant is entitled under the Act as a result of her injuries of September 7, 2000.

E. The District Director shall perform all calculations necessary to effect this Order.

SO ORDERED.

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LINDA S. CHAPMAN